

GREENBERG GLUSKER FIELDS CLAMAN
& MACHTINGER LLP
1900 Avenue of the Stars, 21st Floor
Los Angeles, California 90067-4590

BONNIE E. ESKENAZI (SBN 119401)
BEskenazi@ggfirm.com
ELISABETH A. MORIARTY (SBN 156569)
EMoriarty@ggfirm.com
RICARDO P. CESTERO (SBN 203230)
RCestero@ggfirm.com
GREENBERG GLUSKER FIELDS CLAMAN &
MACHTINGER LLP
1900 Avenue of the Stars, 21st Floor
Los Angeles, California 90067-4590
Telephone: 310.553.3610
Fax: 310.553.0687

Attorneys for Plaintiffs Fourth Age Ltd.; Priscilla Mary
Anne Reuel Tolkien, as Trustee of The Tolkien Trust;
The J.R.R. Tolkien Estate Ltd; HarperCollins Publishers
Ltd; Unwin Hyman Ltd.; and George Allen & Unwin
(Publishers) Ltd.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FOURTH AGE LIMITED, *et al*,
Plaintiffs,

v.

WARNER BROS. DIGITAL
DISTRIBUTION, INC., *et al*,
Defendants.

Case No. CV 12-09912 ABC (SHx)

Hon. Audrey B. Collins

**THE TOLKIEN/HC PARTIES'
ANSWER TO WARNER'S
FIRST AMENDED
COUNTERCLAIMS FOR (1)
BREACH OF CONTRACT AND
(2) DECLARATORY RELIEF**

REQUEST FOR JURY TRIAL

WARNER BROS. DIGITAL
DISTRIBUTION, INC., *et al*,
Counterclaim Plaintiffs,
v.
FOURTH AGE LIMITED, *et al*,
Counterclaim Defendants.

1 Plaintiffs and Counterclaim Defendants Fourth Age Ltd.; Priscilla Mary
 2 Anne Reuel Tolkien, as Trustee of The Tolkien Trust; The J.R.R. Tolkien Estate
 3 Ltd. (the “Tolkien Parties”); HarperCollins Publishers Ltd.; Unwin Hyman Ltd.;
 4 and George Allen & Unwin (Publishers) Ltd. (the “HC Parties”) (collectively, the
 5 “Tolkien/HC Parties”), by and through their undersigned counsel, hereby respond
 6 to the allegations set forth in Defendants and Counterclaim Plaintiffs Warner Bros.
 7 Home Entertainment Inc.’s, Warner Bros Entertainment Inc.’s, Warner Bros.
 8 Consumer Products, Inc.’s, and New Line Productions, Inc.’s (collectively
 9 “Warner”) First Amended Counterclaims as follows:

10 **JURISDICTION AND VENUE**

- 11 1. Paragraph 1 contains legal conclusions to which no response is
- 12 required.
- 13 2. Paragraph 2 contains legal conclusions to which no response is
- 14 required.
- 15
- 16

17 **NATURE OF THE ACTION**

- 18 3. The Tolkien/HC Parties lack knowledge or information sufficient to
- 19 admit or deny the allegations contained in paragraph 3, and on that basis deny them.
- 20 4. The Tolkien/HC Parties admit they assert Warner does not have
- 21 certain rights in *The Lord of the Rings* and *The Hobbit* (the “Tolkien Works”),
- 22 including, without limitation, intangible video games and gambling games. The
- 23 Tolkien/HC Parties deny the remaining allegations of paragraph 4.
- 24 5. The Tolkien/HC Parties deny the allegations of paragraph 5.
- 25
- 26
- 27
- 28

THE PARTIES

6. The Tolkien/HC Parties admit the allegations of paragraph 6 based on their information and belief.

7. The Tolkien/HC Parties admit the allegations of paragraph 7 based on their information and belief.

8. The Tolkien/HC Parties admit the allegations of paragraph 8 based on their information and belief.

9. The Tolkien/HC Parties admit the allegations of paragraph 9 based on their information and belief.

10. The Tolkien/HC Parties admit and allege Fourth Age Ltd. was a corporation created and existing under the laws of the United Kingdom, which has since changed its name to The Tolkien Estate Limited.

11. The Tolkien/HC Parties admit the allegations of paragraph 11.

12. The Tolkien/HC Parties admit the unincorporated Tolkien Trust is and/or was a registered charity in the United Kingdom and that it is in the process of transferring and/or has transferred its business and/or assets to a charitable company also known as The Tolkien Trust.

13. The Tolkien/HC Parties admit the allegations of paragraph 13 and further allege that The J.R.R. Tolkien Estate Ltd. is now a wholly-owned subsidiary of The Tolkien Estate Limited.

14. The Tolkien/HC Parties admit that The Tolkien Estate Limited (previously Fourth Age Ltd.), The Tolkien Trust (previously the unincorporated Tolkien Trust), and The J.R.R. Tolkien Estate Ltd. (collectively, the “Tolkien Estate”) are the successors-in-interest to J.R.R. Tolkien with respect to certain of his copyright interests in *The Lord of the Rings* and *The Hobbit*.

15. The Tolkien/HC Parties admit the allegations of paragraph 15.

16. The Tolkien/HC Parties admit the allegations of paragraph 16.

17. The Tolkien/HC Parties admit the allegations of paragraph 17.

18. The Tolkien/HC Parties admit HarperCollins Publishers Ltd. is the worldwide licensee of the book publishing rights in *The Lord of the Rings* and *The Hobbit*, that George Allen & Unwin (Publishers) Ltd. is the successor, by way of name change, of George Allen & Unwin Ltd., and that certain rights to proceeds from the July 8, 1969 contract between George Allen & Unwin Ltd. and United Artists Corp. were assigned to Unwin Hyman Ltd. and HarperCollins Publishers Ltd. The Tolkien/HC Parties lack knowledge or information sufficient to admit or deny the remaining allegations contained in paragraph 18, and on that basis deny them.

19. The Tolkien/HC Parties deny the allegations of paragraph 19.

FACTUAL BACKGROUND¹

20. The Tolkien/HC Parties admit Warner and Zaentz are the successors-in-interest to Tolkien Work-related film rights that were granted to United Artists Corp. under the 1969 Agreements and certain limited merchandising rights that were granted to United Artists Corp. under Schedules D to the 1969 Agreements. The Tolkien/HC Parties deny the remaining allegations of paragraph 20.

21. The Tolkien/HC Parties deny the allegations of paragraph 21.

22. The Tolkien/HC Parties deny the allegations of paragraph 22.

23. The Tolkien/HC Parties admit Cathleen Blackburn is or was counsel for Fourth Age Ltd., The Tolkien Trust, and The J.R.R. Tolkien Estate Ltd. The Tolkien/HC Parties further admit that Ms. Blackburn was previously counsel for The J.R.R. Tolkien 1967 Discretionary Settlement and The J.R.R. Tolkien Copyright Trust, and that she is or was company secretary for Fourth Age Ltd. and the J.R.R. Tolkien Estate Ltd. The Tolkien/HC Parties deny the remaining allegations of paragraph 23.

¹ The Tolkien/HC Parties object to Warner's headings labeled "A" and "C" at page 4, lines 1-2, and at page 7, lines 16-17, respectively, on the grounds that they are argumentative and do not contain proper factual allegations. To the extent a further response is required, the Tolkien/HC Parties deny any factual allegations contained in these headings.

24. The Tolkien/HC Parties admit that Cathleen Blackburn received some version of a purported agreement between Zaentz and Sierra On-Line. The Tolkien/HC Parties deny the remaining allegations of paragraph 24.

25. The Tolkien/HC Parties deny the allegations of paragraph 25.

26. The Tolkien/HC Parties admit Ms. Blackburn received third party inquiries about rights in the Tolkien Works and that she sometimes directed those inquiries to Zaentz, forwarding a copy of the inquiry to Zaentz. The correspondence speaks for itself. The Tolkien/HC Parties deny the remaining allegations of paragraph 26.

27. The Tolkien/HC Parties deny the allegations of paragraph 27.

28. The Tolkien/HC Parties deny the allegations of paragraph 28.

29. The Tolkien/HC Parties deny the allegations of paragraph 29.

30. The Tolkien/HC Parties lack knowledge or information sufficient to admit or deny the allegations contained in paragraph 30, and on that basis deny them.

31. The Tolkien/HC Parties admit that in September of 2010 the parties entered into the 2010 Regrant Agreement, which was signed by several of the Tolkien/HC Parties, as well as related entities and individuals. The Tolkien/HC Parties lack knowledge or information sufficient to admit or deny the remaining allegations contained in paragraph 31, and on that basis deny them.

32. The Tolkien/HC Parties admit the parties and/or their predecessors entered into the 2010 Regrant Agreement. The agreement speaks for itself. Except to the extent they contain legal conclusions to which no response is required, the Tolkien/HC Parties deny the remaining allegations of paragraph 32.

33. The Tolkien/HC Parties deny the allegations of paragraph 33.

34. The Tolkien/HC Parties admit the parties and/or their predecessors entered into the 2010 Regrant Agreement. The agreement speaks for itself. Except to the extent they contain legal conclusions to which no response is required, the

1 Tolkien/HC Parties lack knowledge or information sufficient to admit or deny the
2 remaining allegations contained in paragraph 34, and on that basis deny them.

3 35. The Tolkien/HC Parties deny that their assertion that Warner and
4 Zaentz do not have these rights is unreasonable and not asserted in good faith. The
5 Tolkien/HC Parties further deny that they are attempting to extract additional huge
6 sums of money for rights and/or take back rights they had already granted. The
7 Tolkien/HC Parties lack knowledge or information sufficient to admit or deny the
8 remaining allegations contained in paragraph 35, and on that basis deny them.

9 36. The Tolkien/HC Parties deny the allegations of paragraph 36.

10 37. The Tolkien/HC Parties deny the allegations of paragraph 37.

11 **FIRST COUNTERCLAIM**

12 **(Breach of Contract)**

13
14 38. The Tolkien/HC Parties reassert and incorporate by reference their
15 answers to paragraphs 1 through 37, as though fully set forth herein.

16 39. The Tolkien/HC Parties deny the allegations of paragraph 39.

17 40. The Tolkien/HC Parties deny the allegations of paragraph 40.

18 41. Paragraph 41 contains legal conclusions to which no response is
19 required.

20 42. Except to the extent they contain legal conclusions to which no
21 response is required, the Tolkien/HC Parties deny the allegations of paragraph 42.

22 43. The Tolkien/HC Parties deny the allegations of paragraph 43.

23 44. The Tolkien/HC Parties deny the allegations of paragraph 44.

24 45. The Tolkien/HC Parties deny the allegations of paragraph 45.

SECOND COUNTERCLAIM

(Declaratory Judgment)

46. The Tolkien/HC Parties reassert and incorporate by reference their answers to paragraphs 1 through 45, as though fully set forth herein.

47. The Tolkien/HC Parties admit there is a dispute regarding the scope of Warner's merchandising rights under Schedules D to the 1969 Agreements. The Tolkien/HC Parties deny the remaining allegations of paragraph 47.

48. The Tolkien/HC Parties admit that pursuant to an agreement dated as of August 21, 2009, the parties released certain claims, defenses, and counterclaims that arose or may have existed prior to September 30, 2008. The Tolkien/HC Parties deny the remaining allegations of paragraph 48.

49. The Tolkien/HC Parties admit Warner requests the declarations contained in paragraph 49.

50. Paragraph 50 contains legal conclusions to which no response is required.

PRAYER FOR RELIEF

The Tolkien/HC Parties deny that the requested relief is appropriate and that Warner is entitled to any relief whatsoever.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

1. Warner's counterclaims fail to state any claim on which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

(First Amendment)

2. Warner's counterclaims are barred, in whole or in part, because the Tolkien/HC Parties' conduct on which they are based is absolutely protected by the First Amendment to the United States Constitution.

THIRD AFFIRMATIVE DEFENSE

(Privilege)

3. Warner's counterclaims are barred, in whole or in part, because the Tolkien/HC Parties' conduct on which they are based is absolutely protected by the litigation privilege.

FOURTH AFFIRMATIVE DEFENSE

(Unclean Hands)

4. Warner's counterclaims are barred, in whole or in part, by the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE

(Unjust Enrichment)

5. Warner's counterclaims are barred, in whole or in part, because Warner would be unjustly enriched if it were granted the relief sought.

SIXTH AFFIRMATIVE DEFENSE

(Releases)

6. Warner's counterclaims are barred, in whole or in part, to the extent they relate to or arise from any conduct released by operation of the September 7, 2010 Hobbit Binding Term Sheet and/or the August 21, 2009 Binding Term Sheet.

SEVENTH AFFIRMATIVE DEFENSE

(Lack of Causation)

7. Warner's counterclaims are barred, in whole or in part, because Warner cannot establish any alleged damage and/or harm that was caused by the

1 Tolkien/HC Parties.

2 **EIGHTH AFFIRMATIVE DEFENSE**

3 (Good Faith)

4 8. Warner's counterclaims are barred, in whole or in part, because the
5 Tolkien/HC Parties' conduct on which they are grounded was undertaken based on
6 a good faith, reasonable interpretation of the parties' agreement.

7 **NINTH AFFIRMATIVE DEFENSE**

8 (Warner's Own Actions Caused Any Damage)

9 9. To the extent Warner has suffered any damage and/or harm (which the
10 Tolkien/HC Parties expressly deny), any alleged damage and/or harm was caused
11 by Warner's own actions.

12 **TENTH AFFIRMATIVE DEFENSE**

13 (Zaentz's Actions Caused Any Damage)

14 10. To the extent Warner has suffered any damage and/or harm (which the
15 Tolkien/HC Parties expressly deny), any alleged damage and/or harm was caused
16 by Zaentz's actions.

17 **ELEVENTH AFFIRMATIVE DEFENSE**

18 (Failure to Mitigate)

19 11. To the extent Warner has suffered any damage and/or harm (which the
20 Tolkien/HC Parties expressly deny), Warner failed to take the necessary, prudent,
21 and appropriate steps to mitigate the alleged damage and/or harm it claims to have
22 suffered.

23 **TWELFTH AFFIRMATIVE DEFENSE**

24 (Offset)

25 12. To the extent Warner has suffered any compensable damage and/or
26 harm (which the Tolkien/HC Parties expressly deny), as a result of Warner's
27 wrongful conduct as set forth in the Tolkien/HC Parties' complaint, the Tolkien/HC
28 Parties are entitled to an offset against Warner.

THIRTEENTH AFFIRMATIVE DEFENSE

(Damages Uncertain, Contingent, and Speculative)

13. To the extent Warner has suffered any damage (which the Tolkien/HC Parties expressly deny), Warner is not entitled to recover for any such damages because they are uncertain, contingent, and speculative.

FOURTEENTH AFFIRMATIVE DEFENSE

(Lack of Standing)

14. Warner lacks standing to pursue some or all of the claims asserted in its counterclaims. The Tolkien/HC Parties are informed and believe, and on that basis allege, that the term “Warner” is defined in the counterclaims to include four entities, and that the counterclaims never articulate which Warner entity owns which relevant interests, if any.

FIFTEENTH AFFIRMATIVE DEFENSE

(Reservation of Defenses)

15. The Tolkien/HC Parties reserve the right to allege other affirmative defenses as they may become known during the course of discovery, and hereby reserve the right to amend their answer to allege such affirmative defenses at such time as they become known.

DATED: July 25, 2013

GREENBERG GLUSKER FIELDS
CLAMAN & MACHTINGER LLPBy: s/s Bonnie E. Eskenazi
BONNIE E. ESKENAZI (SBN 119401)

GREENBERG GLUSKER FIELDS CLAMAN
& MACHTINGER LLP
1900 Avenue of the Stars, 21st Floor
Los Angeles, California 90067-4590

REQUEST FOR JURY TRIAL

The Tolkien/HC Parties hereby request a jury trial on all issues so triable.

DATED: July 25, 2013

GREENBERG GLUSKER FIELDS
CLAMAN & MACHTINGER LLP

By: s/s Bonnie E. Eskenazi
BONNIE E. ESKENAZI (SBN 119401)

GREENBERG GLUSKER FIELDS CLAMAN
& MACHTINGER LLP
1900 Avenue of the Stars, 21st Floor
Los Angeles, California 90067-4590